



Al-Ghaafiry (Suing as the Lawful Attorney of Mrs Bintali Kibamba) v Izwe Loans Kenya Ltd (Land Case E013 of 2021) [2025] KEELC 905 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 905 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
LAND CASE E013 OF 2021
AE DENA, J
FEBRUARY 27, 2025**

BETWEEN

**KHELEF HAMED AL-GHAAFIRY (SUING AS THE LAWFUL ATTORNEY OF
MRS BINTALI KIBAMBA) PLAINTIFF**

AND

IZWE LOANS KENYA LTD DEFENDANT

RULING

1. The Plaintiff instituted this suit vide a Complaint dated 4/03/2024. Alongside the Complaint was filed a Notice of Motion application dated 4/03/2024. The application is the subject of this ruling and seeks the following orders; -
 1. SPENT
 2. That pending the hearing and determination of this application the Honourable Court be pleased to issue a temporary injunction restraining the Defendant by itself, its agents, servants, employees and or representatives, assigns and or any other persons acting on its behalf from transferring, alienating, advertising for sale, selling and or dealing in any manner in all that Parcel of land known as Plot No.KWALE/RAMISI PHASE II SCHEME/1079.
 3. That pending the hearing and determination of this suit the Honourable Court be pleased to issue a temporary injunction restraining the Defendant by itself, its agents, servants, employees and or representatives, assigns and or any other persons acting on its behalf from transferring, alienating, advertising for sale, selling and or dealing in any manner in all that Parcel of land known as Plot No.KWALE/RAMISI PHASE II SCHEME/1079.
 4. That this Honourable Court do issue any other relief it deems fit and just in the circumstances
 5. That costs of this Application be provided for.



2. The application is premised on the grounds on it face which are reiterated in the affidavit sworn in support of the application by KHELEF HAMED AL-GHAAFIRY. The deponent avers that he was appointed attorney by Binti Kibamba (herein Binti) on 22/11/23. It is deponed that in June 2023 Binti successfully applied for a loan facility with the Defendant using Plot No.KWALE/RAMISI PHASE II SCHEME/1079 (suit property) as security.
3. That before release of the funds Zenith Management Valuers (herein Zenith) was appointed to undertake a valuation of the suit property. In its report dated 29/6/23 Zenith valued the property at Kshs. 6.5 million with a forced value of Kshs4,875,000/-. The size was given as 0.288 Hactares and its proximity to the Kwale-Msambweni road as 550 meters away. Concerned that the property had been undervalued Binti disputed the report.
4. That following the above the District Surveyor was appointed to undertake another valuation. Through a report dated 5/7/23. The same confirmed the size as 0.288 Hactares but stated the distance away from Kwale-Msambweni road as 230 meters. It is deponed that vide a report dated 20/02/2018 Value Consult Ltd had returned the same size and distance and placed the market value as Kshs. 1.5 million and force value (sic) of Kshs.1,125,000/-.
5. That there existed another report dated 25/4/23 prepared following Bintis previous engagement with Mwanainchi Credit Ltd which stated the distance away from Kwale-Msambweni road as 230 meters, property value as Kshs.7 million and forced value as 5,200,00/-.
6. The deponent states that despite the emerging disparities between Zenith report and the others, the Defendant on 20/7/23 released to Binti a loan amount of Kshs.1.950,000/- with the suit property as collateral as the issue of the valuations were being looked into.
7. It is averred that Binti serviced the loan until August 2023 when she sustained serious injuries in an accident which led to her defaulting on loan repayments. That despite timeously conveying the information on the accident to the bank with a request for adjustment of the repayment plan the Defendant as well as the outstanding issue of a repeat valuation by M/s Zenith or another independent surveyor, the Defendant issued binti with a statutory notice on 1/11/2023. The outstanding amount demanded was 3,902,767.33. A fresh notice for Kshs.2,612,191 was issued on 14/12/2023.
8. The deponent also alleges that since the Defendant had failed to act on the issue of the evaluation Binti had appointed M/s Musyoki & Associates to undertake a further valuation. That vide a report dated 6/9/2023 the said valuers confirmed the distance away from Kwale-Msambweni road as 230 meters, property value as Kshs. 10.5 million and forced value as 7,000,00/-.
9. It is averred that all this time Binti had shared all the valuation reports herein with Zenith who did not respond. That due to the Defendants reluctance to resolve the issues, Binti issued a demand notice and filed this suit for the orders sought in the Plaint and the present application.

Preliminary Objection

10. The Defendant opposed the application by filing a Notice of Preliminary Objection dated 5th August 2024 on the following grounds; -
 1. This Honourable court lacks jurisdiction to hear and determine this matter given its specialised jurisdiction under article 162(2)(b) of *the Constitution* of Kenya and section 13 of the Environment and *Land Act* which is limited to only disputes relating to environment and the use and occupation of and title to land.



2. The Plaintiff and suit cannot be salvaged by transfer to the High Court since this court lacks jurisdiction to handle the matter in any way including transfer as was held by the Supreme Court in *Albert Chaurembo Mumba & 7 Others Vs. Maurice Munyao & 148 others* (2019)eKLR.
3. The Plaintiffs suit and application are therefore incurably defective, bad in law and ought to be struck out in limine.
11. The Defendant also filed a replying affidavit sworn by VALLEN OMARI its Legal Manager on 18/10/2024. It is averred that the application is meant to frustrate the Defendants accrued statutory power of sale over the suit property despite the Plaintiffs acknowledgement of default. That the facility of Kshs.1,950,000/- herein was based on Letter of offer dated 21/6/2023 and the Secured Loan Facility Agreement dated 22/6/2023 which the borrower executed freely and willingly and accepting to be bound by the terms. The deponent outlined the terms.
12. Rehashing the market and forced sale values stated in the valuation report prepared by Ms Zenith who was appointed by the Defendant it is averred that the report also flagged a slight difference in the boundaries placement vis a vis the provisions in the survey map. Zenith recommended beacon placement be confirmed by county surveyor. Subsequently the county surveyor in his report dated 5/7/23 stated that the excess acreage on the ground was as a result of encroachment on a road reserve. The Defendant agreed to disburse the loan amount on the understanding that the borrower would obtain beacon certificates to resolve the outstanding boundary issue. A charge was registered against the property to secure the facility.
13. It is deponed that the first loan repayment would fall due on 15th September 2023 but in August 2023 the borrower informed the Defendant she had suffered a structure and requested for a 60 days moratorium from the 15th September 2023. The bank declined and advised that the 1st instalment should be paid before consideration of a moratorium and renegotiated monthly repayment plan. The Defendant has never complied. It is stated that Kshs.2,452,734.80 referred to by the borrower was a reduced sum of the outstanding amount an offer made to enable the borrower defray the entire loan amount by 11/11/23. The Defendant failed to remit the said amount. That further offers was made despite the interest continuing to accrue but the Defendant has not obliged leaving an outstanding loan balance of Kshs 4,871,108.63 as at 22nd July 2024 and the borrower remains non committal.
14. At paragraph 20 the deponent demonstrates how the application for interlocutory injunction has failed to meet the three-pronged test for the grant of injunctions. The details are captured in the Submissions filed on behalf of the Defendants. It is stated that the balance of convenience tilts to ward disallowing the application as the metastasizing loan arrears may soon outstrip the value of the suit property.

Submissions

15. The court issued directions on 7/10/24 that the application dated 4/3/2024 and the preliminary objection be heard concurrently by way of written submissions. Parties filed and exchanged submissions and which the court has considered in rendering this ruling.

ANALYSIS AND DETERMINATION

16. I have considered the application, the supporting affidavit, the attendant submissions. I have also considered the Defendants responses thereto and submissions in opposition thereto. The issues that stand out for determination is whether the preliminary objection raised is merited and whether the



orders sought in the application should be granted. Further whether the suit can be salvaged by transfer to the High Court. The determination of the second issue is dependant upon a negative finding on the preliminary objection.

Is the Preliminary objection merited

17. I will first determine whether the preliminary objection is properly raised guided by the case of Mukisa Biscuits Manufacturing Co. Ltd -vs- West End Distributors [1969] E.A. 696 where Law JA at page 700 stated;

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

18. Further Black’s law Dictionary 11th Edition defines a preliminary objection as

‘..as an objection that, if upheld would render further proceedings before the tribunal impossible or unnecessary. An objection to the court’s jurisdiction is an example of a preliminary objection’.

19. The Defendant contents that this court lacks jurisdiction to determine the present suit whose main claim is summarised under paragraphs 17 and 18 of the Plaintiff which shows the Plaintiffs claim as a commercial dispute falling within the jurisdiction of the High court.

20. The pleadings are clear that the suit property was used as a collateral for a loan facility issued to the Plaintiff and the loan amount has not been paid to date. It is the finding of this court should the court uphold the grounds raised in the preliminary jurisdiction, then the suit will be disposed of preliminarily without the court resorting to ascertaining the facts. It is therefore this court’s finding that the preliminary objection has been properly raised.

21. Is the Preliminary objection merited? The Defendant submits that the gist of the Plaintiffs claim is a permanent injunction against the Defendants and its agents from inter alia advertising for sale the suit property. Further a declaration that the report by Zenith Valuers Ltd is a nullity and for appointment of two neutral independent valuers. That the suit relates to utilisation of the suit property as collateral and the related issue of value of the same which is a commercial dispute falling the jurisdiction of the High court. The court has been referred to Practice Directions ‘ CLASSIFICATION OF COMMERCIAL MATTERS – 1997’ issued on 18/11/1997 by Chief Justice Abdul Majid Cockar which provided that all proceedings in which an injunction is sought to restrain realisation of securities whether in debentures or charge were to be deemed commercial matters suitable for trial by the Commercial Division of the High Court.

22. The Plaintiffs in their submissions dated 4/12/2024 urge that once the court is seized of jurisdiction. That the Defendant exercised her rights by issuing a statutory power of sale as provided this matter clearly became a land. That the Plaintiff is not disputing having not cleared the loan but the bottom line was that the subject matter was undervalued thus the reason why the court is being moved for re-valuation. The court was not led to any precedents to buttress this position.

23. The gravamen of the preliminary objection herein has been a subject of court pronouncements at the Court of Appeal culminating into a final determination by the Supreme Court of Kenya.



24. The Court of Appeal in *Bank of Africa Kenya Limited & Another Vs. TSS Investment Limited & 2 Others* (2024) KECA 410 (KLR) cited by the Defendants after considering the article 162(2) (b) of *the Constitution* of Kenya 2010, the provisions of section 13 of the ELC Act, the definition of a charge enunciated in section 2 of the *Land Act* the court had this to say;-
- 18 'In view of the foregoing, the only question that falls to be determined is whether the respondents suit against the appellants involved '...matters relating to environment and the use and occupation and title to land'. We do not think so. In our considered view, the issues in contention in the suit, and the purpose for which the respondents moved the trial court for injunctive relief sought and granted in the impugned ruling, were intended to forestall the 1st appellant's exercise of its statutory power of sale over the suit properties on the basis of the alleged tenancy relationship with the 3rd respondent.
25. The learned judges of the Court of Appeal stated further as follows;-
- 20 'We form this view taking to mind this courts decision in the aforecited case of *Co-operative Bank of Kenya Limited Vs. Patrick Kangethe Njuguna & 5 Others* (see (2017)eKLR) where it was held that ELC only has jurisdiction to deal with disputes connected to 'use' of land and contracts incidental to the 'use' of land, which do not include mortgages,charges,collection of dues and rents which fall within the civil jurisdiction of the High Court. Moreover, a charge is a disposition that has no direct contractual relation to 'use' (by a tenant or licensee) as in this case, of chargors land. In view of the foregoing, we agree with learned counsel for the appellants that the learned judge had no jurisdiction to entertain the respondents suit as pleaded'.
26. Arising from the above binding authorities my task is to review the Plaintiffs suit as pleaded involves matters relating to environment and the use and occupation and title to land.
27. The reliefs sought in the Plaint dated 4/3/2024 are as follows;-
- a. A permanent injunction restraining the Defendant by itself, its agents, servants, employees and or representatives, assigns and or any other person(s) acting on its behalf from transferring, alienating, advertising for sale, selling and or dealing in any manner in all that Parcel of land known as Plot No.KWALE/RAMISI PHASE II SCHEME/1079.
 - b. A declaration that the valuation report by Zenith (Management) Valuers Limited is a nullity and for the appointment of two (2) neutral/independent valuers
 - c. Costs of the suit
 - d. Interest on (c) above
 - e. Any other relief that this Honourable may deem fit and just to grant in the circumstances
28. The Plaintiff has pleaded that Binti successfully applied for a loan facility with the Defendant using Plot No.KWALE/RAMISI PHASE II SCHEME/1079 (suit property) as security. It is pleaded at paragraph 5 of the Defence that the bank agreed to disburse the loan facility and to proceed with charging of the suit property. it is not in dispute that the charge was registered against the suit property as collateral for the loan facility. It is also not in dispute from the pleadings that Binti defaulted the reasons notwithstanding. It also pleaded by Binti in the Plaint that she was indeed served with a statutory notice pursuant to the loan arrangements herein. Therefore, clearly the user of the land for purposes of this claim was to secure the loan and nothing more. Binti the borrower now wants the Defendant stopped from intetalia....'advertising the sale' of the suit property as seen in prayer (a) above. Prayer (b) in the Plaint can also not be delinked from prayer (a) above as it is a derivative of the loan



arrangements and the charge as clearly pleaded in her Pleint that Zenith was instructed to undertake a valuation of the property for purposes of determining its value.

29. Section 13 of the of the *Environment and Land Court Act* gives the ELC original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of the ELC Act or any other law applicable in Kenya relating to environment and land. The said Article demarcates the jurisdiction of the ELC Court by enacting that it shall have power to hear and determine disputes relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; Compulsory acquisition of land; Land administration and management and relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and any other dispute relating to environment and land.
30. In view of the above and the guidance of the authorities cited herein I note that Plaintiff claim revolves around the enforcement of statutory power of sale by the Defendant which the Plaintiff wants to stop for alleged undervaluation of the land and which to me are inherently interlinked with the charge and cannot form a basis to invoke the jurisdiction of this court. It is my finding that the claim by the Plaintiff has nothing to do with the use and occupation of, or title to land, but that as seen in the prayers sought, the claim herein is solely a commercial dispute over the amounts owed by the plaintiff.
31. I have noted the Defendants submission that this suit cannot be transferred to the High Court Commercial Division. The Plaintiffs did not address the court in this regard and whether the suit can be salvaged. However, I have read the decision in *Albert Chaurembo Mumba & 7 Others Vs. Maurice Munyao & 148 others* (2019) eKLR and I agree with the decision that suits filed before courts without jurisdiction, the said courts have no power to transfer the suit. Indeed, the suit is dead on arrival and this court cannot purport to be a mortician. There is nothing to transfer. See *Equity Bank Limited Vs Bruce Mutie Mutuku T/A Diani Tour & Travel* (2016) eKLR
32. I think I have said enough to show why the preliminary objection must be sustained. In the premises, this court finds and holds that it has no jurisdiction to hear and determine this dispute. I must down my tools. The suit is hereby stuck off. Costs are the discretion of the court and since there is still a loan to repay, I will therefore make no orders as to costs.

DATED, SIGNED AND DELIVERED ELECTRONICALLY VIA CTS THIS 27TH DAY OF FEBRUARY 2025.

.....

HON. A.E DENA

JUDGE

27/2/2025

